88- 1725

Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

JUAN FRANCISCO VENEGAS,

*Petitioner,*

v.

MICHAEL R. MITCHELL,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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53 pp

## QUESTIONS PRESENTED

Petitioner, Juan Francisco Venegas, and Respondent, Michael R. Mitchell, entered into a contingent fee agreement for Mr. Mitchell to represent Mr. Venegas in the trial of a pending civil rights action. The agreement called for a non-refundable cash retainer of $10,000 applied against the greater of either a court awarded fee or 40% of the "recovery". After trial, a judgment was rendered in the amount of $2,080,000 and attorney's fees were awarded pursuant to 42 U.S.C. § 1988 in the amount of $117,000.

Thereafter, Mr. Mitchell, claiming his work was done, refused to defend the judgment on appeal without additional compensation and filed a motion to intervene* seeking a lien against any recovery. Mr. Venegas responded that under both Federal and California law the "reasonable fee" previously determined by the court was the only fee to which Mr. Mitchell was entitled.

The issues presented therefore are:

1. Did Congress, in passing Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988) intend that the "reasonable fee" awarded under § 1988 be merely a credit against larger contingent fee?

2. If Congress did so intend, can an attorney in a pure civil rights case, consistent with his fiduciary duty to his client, insist on the enforcement of a contingent fee agreement without having disclosed to the client the benefits he has under 42 U.S.C. § 1988 when the agreement was made?

3. Can a Federal court enforce a contingent fee agreement in a civil rights case in a manner which is contrary to the public policy as expressed by the highest court in the state in which the court sits?

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* When Mr. Mitchell refused to defend the judgment on appeal, unless Mr. Venegas agreed to pay him an additional 10% of the "recovery", Mr. Venegas called present counsel, in Sag Harbor, New York, for help because present counsel had represented Mr. Venegas on the appeal of his conviction for first degree murder which the California Supreme Court reversed on the ground of insufficiency of evidence.

## LIST OF PARTIES NOT OTHERWISE NOTED IN THE TITLE

The parties defendant in the lawsuit when Mr. Mitchell made this motion to intervene were Long Beach police officers Ronnie J. Skaggs and Carthel Roberson.



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MICHAEL R. MITCHELL,

*Respondent*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Juan Francisco Venegas, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

### OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Ninth Circuit is reported on Westlaw at 867 F.2d 527, however, it is not known at this time if the amended opinion will retain the same citation. The amended opinion is reprinted in the appendix hereto, p. A-1 *infra*.

The memorandum of decision and order, filed January 23, 1987, and the correcting order, filed February 9, 1987, of the United States District Court for the Central District of California are not reported. They are reprinted in the appendix hereto at p. A-18 and p. A-31 *infra* respectively.

## JURISDICTION

Petitioner filed his complaint alleging violations of 42 U.S.C. § 1983 and § 1985. Jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1343. Respondent filed his motion to intervene invoking the court's ancillary jurisdiction.

The United States Court of Appeals for the Ninth Circuit exercised jurisdiction of the final order of the district court pursuant to 28 U.S.C. § 1291.

The Ninth Circuit filed its judgment on January 31, 1989. On February 13, 1989, Petitioner filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected, on April 4, 1989.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The statute involved is the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. It is reprinted in the appendix hereto at p. A-32 *infra*.

## STATEMENT OF THE CASE

On December 25, 1971, Petitioner, Juan Francisco Venegas (hereinafter Mr. Venegas), was arrested along with one Lawrence Reyes for murder of William Staga. After a trial by jury, they were convicted and sentenced to life in prison. The California Supreme Court reversed Mr. Venegas' conviction on the ground of insufficiency of evidence in *People v. Reyes*, 12 Cal. 3d 486,



116 Cal. Rptr. 217, 526 P.2d 225 (1974). Mr. Venegas was released from State Prison on October 28, 1974.

Thereafter, Mr. Venegas filed a State court tort action against several Long Beach police officers and on October 28, 1977, Mr. Venegas filed a complaint in Federal court under 42 U.S.C. § 1983 and § 1985 against these Long Beach police officers alleging the use of perjured evidence. On July 6, 1981, the district court granted summary judgment on the ground that the action was barred by the statute of limitations. The Ninth Circuit reversed in *Venegas v. Wagner*, 704 F.2d 1144 (9th Cir. 1983).

Mr. Venegas approached Respondent, Michael R. Mitchell (hereinafter Mr. Mitchell), in September of 1985, to represent him in his Federal law suit after the reversal of a State court judgment in Mr. Venegas' favor for $1 million, and after his then attorney, by letter dated August 30, 1985, told Mr. Venegas to find another lawyer.

At that time the trial was set to begin November 5, 1985. Mr. Venegas agreed to pay Mr. Mitchell $10,000 as a non-refundable retainer and 40% of the gross amount recovered. Mr. Mitchell at no time advised Mr. Venegas of the substantial nature of the fees provided by § 1988 nor did he explain to him that the Civil Rights Attorney's Fee Awards Act had been passed to afford him an attorney at no cost to himself. Mr. Venegas was told that the § 1988 fees would belong to Mr. Mitchell if awarded by the court and they could not be waived by Mr. Venegas.

Mr. Venegas and Mr. Mitchell discussed the possibility of appeal. The contract provided for one trial only. Mr. Mitchell told Mr. Venegas that he might not want Mr. Mitchell to handle an appeal if he lost the trial. Mr. Venegas entered into the fee agreement with the understanding that Mr. Mitchell would handle an appeal to defend a judgment because Mr. Mitchell would then be fighting for his own money as well as the client's. In addition, he understood that by conditioning the 40% on recovery, Mr. Mitchell would be taking his fee out of the money Mr. Mitchell recovered.

Subsequent to the signing of the fee agreement, Mr. Venegas agreed that the Law Offices of Johnnie L. Cochran, Jr. could

be associated with Mr. Mitchell and they would share fees on a 50-50 basis.

Trial resulted in a judgment for $2 million in general damages and $40,000 punitive damages against each of three officers (subsequently two officers because of the grant of a motion for j.n.o.v.). Mr. Mitchell and his associate continued to represent Mr. Venegas in post trial matters in the district court after the filing of notices of appeal. However, Mr. Mitchell, relying on the "one trial only" provision in the agreement, demanded another 10% of the recovery to defend the judgment on appeal.

On August 14, 1986, the district court filed its findings of fact and conclusions of law with regard to Mr. Venegas' motion for attorneys' fees. The court found the reasonable value of the legal services of Mr. Mitchell to be $75,000. (216 4 hours times $175 per hour, for a lodestar of $37,870.00 multiplied by two for the excellent result after noting the contingent nature of the case.) The court also found the reasonable value of the legal services of Mr. Mitchell's trial associate to be $27,000. (125.6 hours times $150 per hour, multiplied by one point five) Defendants filed a notice of appeal from that order on September 11, 1986.

On September 23, 1986, Mr. Mitchell moved the district court for leave to intervene to confirm a lien for his services based on a contingent fee agreement.

Mr. Venegas responded, through present counsel because of the conflict of interest of the attorneys of record, that under both Federal law and California[1] law the trial attorneys were

[1] In *Fracasse v. Brent*, 6 Cal. 3d 787, 100 Cal. Rptr. 385, 494 P.2d 9 (1972), the California Supreme Court declared that implied by law into every contract of employment between an attorney and a client is the right of the client to terminate the contract at will. The court held that an attorney with a contingency fee agreement can be discharged before the contingency occurs, with or without cause, and is entitled to recover only the reasonable value of his service. The closest California case on point seems to be *Moore v Fellner*, 50 Cal. 2d 330, 325 P.2d 857, where the contingent agreement was limited "to the conclusion of these two cases in the Superior Court". The California Supreme Court limited the fee to the reasonable value of the work done before the attorney demanded the $2,000 to defend the appeal.



entitled to no greater fees than those previously determined by the court to be reasonable pursuant to 42 U.S.C. § 1988.

On January 29, 1987, the district court entered its order denying Mr. Mitchell's right to intervene to confirm a lien. The court went on to refuse to exercise its discretion to limit trial counsel's attorneys' fees to the § 1988 award.

On February 23, 1987, Mr. Venegas filed notice of appeal (Docket No. 87-5662) from so much of the order as refused to reduce the fees of the former attorneys to the § 1988 award.

On February 24, 1987, Mr. Mitchell filed notice of appeal. (Docket No. 87-5684) (On November 9, 1987, the Ninth Circuit affirmed the original judgments of the trial court with respect to the damages, the j.n.o.v., and the attorneys' fee pursuant to § 1988. *Venegas v Wagner*, 831 F.2d 1514 (9th Cir. 1987))

In the Ninth Circuit, Mr. Venegas took the position that trial counsel were entitled to no greater fee than the § 1988 fee. He argued that the Ninth Circuit case of *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) was inconsistent with Congressional intent in passing § 1988 and with this Court's precedents. Mr. Venegas further argued that even if the *dicta* in *Hamner*, allowing the court to make the plaintiff pay the difference between the § 1988 fee and a contingent fee agreement, was good law, this case fell under the "vast disparity" reasoning of that opinion as to when the agreement should not be enforced. In addition, it was argued that even if a client could make an agreement to pay a fee greater than the § 1988 fee, there should at least be a showing that: a) the attorney explained the purpose of § 1988 to the client; and b) the client knowingly waived the benefits of having all his fees paid by the defendants. The California law on fee agreements was also argued.

On January 31, 1989, the Ninth Circuit reversed the district courts denial of the motion to intervene and affirmed that court's refusal to reduce the contingent fee to the fee awarded pursuant to § 1988. On February 13, 1989, Petitioner filed a timely petition for rehearing and a suggestion for rehearing *en banc*.

Subsequently, this Court decided *Blanchard v. Bergeron*, 109 S.Ct. 939 (1989). By letter and motion to augment the petition for rehearing and suggestion for rehearing *en banc*, Petitioner argued the reasoning in *Blanchard* in support of his position.

The petition for hearing was denied and the suggestion for rehearing *en banc* was rejected on April 4, 1989.

A timely motion to stay the issuance of the mandate was filed on April 6, 1989.

## REASONS FOR GRANTING WRIT

### I

### THERE IS A DIRECT AND INTOLERABLE CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT ISSUE OF FEDERAL STATUTORY INTERPRETATION

a. The Conflict

There is a conflict among the Circuits with regard to the interpretation of The Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988). The conflict is direct in that it is clear that this case would be decided differently in other Circuits and it is intolerable because it is also clear that the improper interpretation of the statute is depriving citizens of their rights in certain Circuits.

The conflict in interpretation can be seen between those Circuits that view the intent of Congress in enacting § 1988 primarily to provide incentive for attorneys to take civil rights cases and those Circuits that properly construe the purpose as providing for the civil rights plaintiffs, acting as a "private attorney general" a means of recovering what it costs them to enforce the civil rights laws.

The Third, Eighth and Ninth Circuits stress attorney incentive and, relying on the use of the common law contingent fee



agreements, allow the client to pay the difference between the "reasonable fee" awarded under 42 U.S.C. § 1988 and a greater fee which is provided for in the agreement. The Second and Tenth Circuits recognize the civil rights plaintiff as one acting as a private attorney general and use the lodestar method in calculating the reasonable fee and award that fee in satisfaction of the client's fee obligation whether it is more or less than the fee called for in the contingent fee agreement.[2]

In 1982, the Second Circuit decided *Wheatley v Ford*, 679 F.2d 1037, 1040-1041 (2d Cir. 1982) which held that "to the extent counsel receives payment of the section 1988 statutory award, his claim for services rendered under his fee arrangement with his client shall be deemed paid and satisfied. This result gives full effect to the Congressional desire to promote private enforcement by allowing citizens 'the opportunity to recover what it costs them to vindicate these rights in court'." 679 F.2d at 1041 (Citation omitted.)

In 1983, the Third Circuit decided *Sullivan v. Crown Paper Bd. Co. Inc.*, 719 F.2d 667, 669-670 (3d Cir. 1983). That case noted the Second Circuit holding in *Wheatley*, but went on to decide "Should the contingency fee be greater, plaintiff should be directed to pay to counsel only the difference between the statutory award and the contingent fee." 719 F.2d at 670.

Four days latter, on October 24, 1983, the Tenth Circuit, *en banc*, decided the best reasoned case on the subject, *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) (*en banc*). The court decided that the conclusion of its panel, that the contingent fee agreement set an upper limit on the § 1988 award, was incorrect in light of this Court's then recent decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The court went on to decide the "reciprocal

[2] *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986) presents another approach. It notes the conflict in other Circuits and states that Congress intended that the plaintiff not have to pay the attorney. Then, it allows the court to chose between a percentage of the recovery fee or an hourly fee, for determining the fee under § 1988, based on the kind of civil rights case.

issue: the impact of the client's fee award on the attorney-client fee arrangement" and decided, "We are inclined to believe that Congress expected section 1988 fee awards to fulfill the client's fee obligation to his attorney." 719 F.2d at 1504.

In 1985, the Ninth Circuit decided *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985). The Ninth Circuit noted the ruling of *Sullivan*, refused to follow *Wheatley*, or *Cooper*, but instead determined: "If the award . . . is less than the contingent fee, the court may consider whether the plaintiff should be compelled to pay the difference between the statutory amount and the contingent fee." 769 F.2d at 1409. In the case at bar Ninth Circuit, upheld the trial court's ruling that Mr. Mitchell's fees were not limited to the § 1988 award, following *Hamner* and also cited *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986) in which the Eighth Circuit rejected *Cooper* and *Wheatley* and followed *Hamner*.

To add to the confusion in the Circuits, if the case at bar where brought in the Eleventh Circuit, a court following *Pharr v. Housing Authority*, 704 F.2d 1216 (11th Cir. 1983), if it found the fee agreement reasonable, would make the defendant pay that amount.

The Ninth Circuit in the case at bar cited *Cooper* for its statement that there was sparse congressional guidance on the issue of the effect of a § 1988 fee on a contingent fee agreement. It is suggested that there is ample authority in the Congressional Record to support *Cooper* and *Wheatley*.

In the Senate, the Judiciary Committee report stated: "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, *then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.*" (Emphasis added.) Senate Report No. 94-1011, (1976) page 2.

Speaking of the bill in the Senate, Senator Tunney, who sponsored the bill in its original form, made it clear that the plaintiff was to pay no fee when he said: "When Congress calls upon



> citizens . . . to go to court to vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court, and to be effective once they get there. *No one expects a policeman, or an officeholder, to pay for the privilege of enforcing the law. It should be no different for a private citizen. . . .*" (Emphasis added.) 122 Cong. Rec. 33313. After quoting from the First Circuit case of *Knight v. Auciello* 453 F. 2d 852 (1st Cir. 1972), the Senator continued, "We cannot hope for vigorous enforcement of our civil rights laws unless we, in the words of the Knight court *'remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.'* That is what this bill does and why it is so vital." (Emphasis added.) 122 Cong. Rec. 33314.

That the bill was intended to attract private attorneys by providing only reasonable compensation to the attorneys was spelled out by Senator Kennedy, the sponsor of the bill that was passed. He took exception to those of his colleagues who called the bill "a lawyer's bill". He stated: "Even with enactment of this bill,

> the lawyer who undertakes to represent a client will face more uncertainty of payment than one involved in a usual contingent fee case. *His fee is contingent not only upon his success, but also on the discretion of the judge before whom he appears.*
>
> "Even if he wins his case and the judge decides he has won a fee as well, *his rate of compensation is fixed not by a grateful client, but by a disinterested judge.* In the traditional contingency case, the lawyer is assured of a high percentage of a monetary award should he win. If the proponents of this bill were interested in creating a relief fund for lawyers, they would have surely gone about it in a different way.
>
> "*No, this bill is not for the purpose of aiding lawyers. The purpose of this bill is to aid civil rights.* (Emphasis added.) 122 Cong. Rec. 33314.

b. The importance of the issue.

According to the *Annual Report of the Director of the Administrative Office of the United States Courts* for the year ending June 1988, there were 16,966 private civil rights cases filed in the Federal courts (Table C3 at page 27). For the year ending June 30, 1987, there were 17,342 total private civil rights filings (*Annual Report of the Director*, Table C3, at page 185). A ruling on the proper relationship between a contingent fee agreement and the fee awarded by the court pursuant to § 1988 is crucial to the determination of the rights of the clients and their attorneys in those cases that are still in the Federal Court system as well as those that will be filed in the future.

An idea of the importance of the issue can also be gleaned from the fact that this Court this term decided *Blanchard v. Bergeron*, __ U.S. __, 109 S. Ct. 939, in which the issue was whether the contingent fee was a limit on the § 1988 fee. As the *Cooper* court said, after it decided the same issue as this Court decided in *Blanchard*, "At this point, however our inquiry is but half finished." 719 F.2d at 1503. It is respectfully suggested that like the court in *Cooper*, it is time for this Court to "examine the reciprocal issue: the impact of the client's fee award on the attorney-client fee arrangement." *ibid*. Only this Court can resolve the conflict in the Circuits and see that clients and attorneys are treated fairly throughout the country.

## II

## THERE IS A CONFLICT BETWEEN THIS CASE AND THE REASONING OF THIS COURT'S PRECEDENTS

In *Hensley v. Eckerhart*, 461 U.S. 424 this Court said "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." 461 U.S. at 435. The concurring and dissenting opinion spoke of Congress' intent to enforce the civil rights laws "by continuing to rely on the private bar and making the defendants bear the full burden of paying for their civil rights obligations." 461 U.S. at 446. In the case at bar



if the district court awarded a fully compensatory fee under § 1988, and therefore the defendants have borne the full burden, the Ninth Circuit is incorrect in allowing Mr. Venegas to pay more.

In the recent case of *Blanchard v. Bergeron*, 109 S.Ct. 939 (1989) this Court said:

> "As we understand § 1988's provisions for allowing a 'reasonable attorney's fee,' it contemplates reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee calculated in the usual way. It is true that the purpose of § 1988 was to make sure that competent counsel was available to civil rights plaintiffs, and it is of course arguable that if a plaintiff is able to secure an attorney on the basis of a contingent or other fee agreement the purpose of the statute is served if the plaintiff is bound by his contract. On that basis, however, the plaintiff should recover nothing from the defendant, which would be plainly contrary to the statute. And Congress implemented its purpose by broadly requiring all defendants to pay a reasonable fee to all plaintiffs, if ordered to do so by the court. *Thus it is that plaintiff's recovery will not be reduced by what he must pay his counsel. Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of this provision.*" 109 S. Ct. at 944 (Emphasis added.)

The Court went on to say: "Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered on vindication of a plaintiff's civil rights." 109 S.Ct. at 946 Thus, this Court seems to be restating its position that the § 1988 fee should be fully compensatory.

This Court stated that the defendant should not pay more than the reasonable fee determined by the lodestar method. The Ninth Circuit failed to reason from that statement that if a fee greater than the § 1988 fee is unreasonable for the defendant, who is supposed to be punished by the fee statute, it is unreasonable for a civil rights plaintiff, for whose benefit the law was enacted. The Ninth Circuit failed to grasp that it is not up to one class of "private attorneys general" to provide the incentive the Ninth Circuit thinks attorneys need. Moreover, it is illogical to make the most severely damaged civil rights plaintiffs forego the protection of a statute, intended to give all civil rights plaintiffs the whole of their damages, by making these more gravely damaged plaintiffs pay an amount greater than the court would make the defendant pay in order to provide incentive to attorneys, who have an ethical duty to uphold civil rights in the first place.

Given this Court's reasoning that the § 1988 fee is designed to prevent a windfalls, (109 S.Ct. at 946) the Ninth Circuit failed to recognize that a windfall is a windfall no matter on which side of the "v." the wind rises.

Further, if the statement that "a plaintiff's recovery will not be reduced by what he must pay his counsel," is to be true in all circumstances then either the court would have to award the contractual fee, which this Court rejected, or the attorney's fee would have to be reduced to what the court determines to be reasonable pursuant to § 1988. By limiting an attorney's fee to the reasonable fee, determined in the proper manner by a disinterested judge, the court would also avoid the "special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief." 109 S.Ct. at 945

This Court said, "It should be noted that we have not accepted the contention that fee awards in § 1983 damage cases should be modeled upon contingent fee arrangements used in personal injury litigation." and quotes *Riverside v. Rivera*, 477 U.S. 561 for the distinction between a private tort suit and one brought to vindicate civil and constitutional rights. However, the Ninth Circuit affirmed the district court refusal to lower the contingent



fee in part because "Venegas has presented no evidence suggesting that a 40% contingent fee is not standard in California for civil rights cases. . .". Thus, if the Ninth Circuit rule stands, no civil rights plaintiff can take advantage of § 1988 because attorneys will continue to use contingent fee agreements in civil rights cases especially if they think they can get a multiple of what the court thinks is a reasonable fee after doubling their normal fee.

The *Blanchard* case can be seen as standing for the proposition that the reasonable fee determination made at the end of the case supercedes the fee agreement made by the attorney and client at the beginning of their relationship. This is seen from the fact that in *Blanchard*, if the attorney ultimately gets the fees and cost of about $40,000, there will be a judgment in the name of the client and presumably a check for more than $50,000. The client will have to endorse that check and pay over to his attorney more than $40,000 and keep his $10,000 damages notwithstanding the fact that he has a contract with the attorney for the attorney to take only 40% of what the client recovers.

Since in *Blanchard* this Court relieved the attorney of the burden of his bad bargain, it is respectfully suggested it is now time to balance the scales and remove the "burden from the shoulders of the plaintiff seeking to vindicate the public right," as Senator Tunney said the Act would. Only in this way will all civil rights plaintiffs be treated equally and only in this way will the words of Senator Kennedy, that the fee of the attorney is determined by a disinterested judge, be true for all.

## CONCLUSION

On the morning of his arrest in Long Beach, California for the murder he did not commit, Mr. Venegas was intending to get up and return to his home in Grand Junction, Colorado. After his release from prison, had he been able to bring his civil rights suit in Colorado, his attorney would be bound by a fiduciary duty to explain the nature of the fee agreement to him, explore options as to different methods for compensating the attorney, and to reduce his fee to what the district court deemed reasonable.

Since Mr. Venegas has not had the benefits Congress sought to convey in enacting the Civil Rights Attorney's Fee Awards Act, because he sued in the Ninth Circuit rather than the Tenth Circuit, this Honorable Court should grant Mr. Venegas' Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals and reverse the judgment of that court.

Respectfully Submitted,

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## APPENDIX

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JUAN FRANCISCO VENEGAS,
*Plaintiff-Appellant,*

v.

RONNIE J. SKAGGS; CARTHEL S. ROBERSON,
*Defendants-Appellees.*

JUAN FRANCISCO VENEGAS,
*Plaintiff-Appellee,*

v.

RONNIE SKAGGS, et al.,
*Defendants-Appellees.*

MICHAEL R. MITCHELL,
*Applicant-in-Intervention-Appellant.*

Nos. 87-5662; 87-5684

D.C. No. CV-77-4047-RJK

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Argued and Submitted
May 2, 1988—Pasadena, California

Filed January 31, 1989
Amended April 4, 1989

Before: Procter Hug, Jr., Betty B. Fletcher and Jerome Farris, Circuit Judges.

Opinion by Judge Fletcher

## SUMMARY


### Attorneys' Fees/Courts and Procedure

Affirming a judgment that an attorney's entitlement to attorney's fees is not limited to a 42 U.S.C. § 1988 award and that a 40% contingency fee is reasonable, the court reversed a denial of the attorney's intervention motion holding that all the considerations which guide the exercise of judicial discretion weigh in favor of permissive intervention.

Attorney Michael Mitchell appeals the district court's denial of his motion to intervene in his former client's 42 U.S.C. § 1983 action. Mitchell moved to intervene in order to confirm a $406,000 lien for attorney's fees on the judgment. Appellant Juan Francisco Venegas, the former client, cross-appeals the district court's ruling that Mitchell's entitlement to attorney's fees is not limited to the section 1988 award of $75,000.

[1] Since the court concluded that the district court erred in denying Mitchell permissive intervention, the court did not decide whether Mitchell is entitled to intervention as of right. [2] A court may grant permissive intervention under Rule 24(b) only if three conditions are met. The court found that the "common question of law or fact" requirement had not been met. [3] The existence of a common question of law or fact does not automatically entitle an applicant to intervene. In this case, however, all of the considerations which guide the exercise of judicial discretion weighed in favor of permissive intervention. [4] A statutory award under section 1988 does not set a ceiling on an attorney's entitlement under a contingent fee contract. [5] A rule limiting an attorney's fees under a contingent agreement to the statutory award would be inconsistent with Congress's goal of promoting respect for civil rights by enhancing "the arsenal" available to plaintiffs in civil rights cases. A rule that limits attorneys' entitlements







under contingent fee agreements to statutory awards would discourage attorneys from agreeing to represent civil rights plaintiffs. [6] If the court accepted Venegas's argument that contingent fees may never exceed statutory awards, this court would in effect be eliminating this category of civil rights cases. [7] The Supreme Court's holding on waivers of attorney's fees awards under section 1988 also supports this court's view. [8] The district court found that Mitchell's contingent fee was reasonable because it reflected the risk of nonrecovery he assumed in accepting this case. There is no basis in the record to support a ruling that the district court abused its discretion in making this finding.


## COUNSEL

Michael S. Bromberg, Sag Harbor, New York, for the plaintiff-appellant.

Michael R. Mitchell, Los Angeles, California, in pro per, and intervenor-appellant.

Harvey A. Schneider, Encino, California, for the applicant-in-intervention-appellant.

## ORDER

Michael Mitchell's letter is treated as a motion for reconsideration of opinion filed January 31, 1989 and is denied except for the following four corrections.

1. The designation of counsel is corrected as follows:

   Michael S. Bromberg, Sag Harbor, New York, for the plaintiff-appellant.

Michael R. Mitchell, Los Angeles California in pro per, and intervenor-appellant.

Harvey A. Schneider, Encino, California for applicant-in-intervention-appellant.

2. At page 804, the sentence "The contingent fee agreement Venegas and Mitchell entered into provided Mitchell with a $10,000 retainer and a contingent fee of 40% of the 'gross amount recovered,' less the retainer and any costs already paid." is corrected to read, "The contingent fee agreement Venegas and Mitchell entered into provided Mitchell with a $10,000 retainer and a contingent fee of 40% of the 'gross amount recovered,' less the retainer."

3. At page 810, note 5: replace "The Supreme Court recently granted certiorari in *Blanchard*. 108 S. Ct. 2869 (1988)." with "The Supreme Court in *Blanchard* held that, while a contingency fee agreement is a relevant 'factor' in determining a reasonable award under Section 1988, '[t]he trial judge should not be limited by the contractual fee agreement between plaintiff and counsel.' *Blanchard v. Bergeron*, 57 U.S.L.W 4191, 4193 (2/21/89)."

4. At page 810, footnote 6, the following is deleted: "Mitchell argues that a district court never has the authority to review a contingent fee that exceeds a statutory award. We disagree."

With these amendments, the panel has voted to deny the petition for rehearing. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35)





The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

## OPINION

FLETCHER, Circuit Judge:

Attorney Michael Mitchell ("Mitchell") appeals the district court's denial of his motion to intervene in his former client's Section 1983 action. Mitchell moved to intervene in order to confirm a $406,000 lien for attorney's fees on the judgment. Juan Francisco Venegas ("Venegas"), the former client, cross-appeals the district court's ruling that Mitchell's entitlement to attorney's fees is not limited to the 42 U.S.C. § 1988 award of $75,000. We exercise jurisdiction pursuant to 28 U.S.C. § 1291. We hold that the district court abused its discretion in denying Mitchell's intervention motion, and remand the case to the district court for a determination of the merits of Mitchell's motion to confirm a lien. We affirm the district court's ruling that Mitchell's entitlement to attorney's fees is not limited to the § 1988 award and that a 40% contingent fee is reasonable in this case.[1]

### I.

Mitchell successfully represented Venegas in his Section 1983 action against Long Beach police officers for false arrest and two and one-half years' imprisonment for a murder conviction obtained using perjured evidence. Venegas retained Mitchell in September 1985, three months prior to a scheduled trial date.

[1]The district court reviewed the 40% contingency fee for reasonableness, even though Mitchell is at most entitled to half of the fee because he agreed to share the fee with other attorneys who participated in the case.

The contingent fee agreement Venegas and Mitchell entered into provided Mitchell with a $10,000 retainer and a contingent fee of 40 percent of the 'gross amount recovered,' less the retainer. The agreement also required Mitchell to apply for attorney's fees under 42 U.S.C. § 1988 and to deduct any such recovery from his 40 percent entitlement. It forbade Venegas from waiving Mitchell's right to court-awarded attorney fees, and allowed Mitchell's intervention to protect his interest in the fees:

> Client agrees that Attorney may, at Attorney's election, and at any time, intervene as a party in the action for the sole purpose of protecting Attorney's interest in and to any attorney fee award which may be made by the trial or any appellate court.

The agreement explicitly covered only Mitchell's handling of the trial:

> This agreement covers one trial only. In the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of Attorney's employment, but are not obligated to do so.

On January 8, 1986, Venegas consented in writing to the association of another law firm, with the attorneys to share the contingent fee 50-50.

At a jury trial Mitchell obtained a $2.12 million verdict for Venegas. After post trial motions this award entitled Mitchell to $406,000 under the contingent fee agreement. Mitchell moved for attorney's fees under Section 1988, as required by the fee agreement. The district court awarded attorney's fees of $117,000 directly to Venegas, of which $75,000 was for Mitchell's participation. The court stayed enforcement of the attorney's fees judgment pending appeal. This court has since affirmed the jury verdict and the district court's attorney's fees award. *Venegas v. Skaggs*, 831 F.2d 1514 (9th Cir. 1987).





Venegas refused Mitchell's offer to represent him on appeal for another 10 percent of the judgment, and substituted counsel on September 14, 1986. He maintains that he "fired" Mitchell, notwithstanding the agreement's coverage of "one trial only."

On October 20, 1986 Mitchell filed his motion to intervene for the purpose of confirming a lien on the judgment for attorney's fees under the contingent fee agreement. Mitchell sought intervention as of right under Fed. R. Civ. P. 24(a)(2), and, alternatively, permissive intervention under Fed. R. Civ. P. 24(b)(2). Venegas did not oppose intervention, but claimed Mitchell's fee entitlement is limited to the court-awarded fees.

The district court denied Mitchell's motion to intervene but declined to invalidate the contingent fee agreement, leaving any dispute over the contract terms to a state court action. The court did, however, decide that the difference between the contingent fee and court-award fees is not a "windfall" to which Mitchell is not entitled.

II.

[1] Since we conclude that the district court erred in denying Mitchell permissive intervention, we need not decide whether Mitchell is entitled to intervention as of right. We review the denial of permissive intervention for an abuse of discretion. *Willard v. City of Los Angeles*, 803 F.2d 526, 527 (9th Cir. 1986).

[2] A court may grant permissive intervention under Rule 24(b) only if three conditions are met: (1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim or defense and the main action must have a question of law and fact in common. *See Cook v. Pan American World Airways, Inc.*, 636 F.Supp. 693, 698 (S.D.N.Y. 1986)(outlining these requirements). The

district court in the case before us found that it had "jurisdiction to determine the rights of the parties under the contingent retainer agreement as ancillary to its conduct of the principal litigation." The court also did not question the timeliness of Mitchell's motion. However, the court found that the "common question of law or fact" requirement had not been met, since it was "unable to discern any relationship between plaintiff's civil rights claims and Mitchell's claim that, under California law, he is entitled to a lien for attorney's fees under a contingent fee contract."[2]

If the court had limited its rulings in Venegas's action to the merits of his Section 1983 claims, then its finding of no "common question of law or fact" might have been justified. In fact, the court chose to decide a question that was common with, and indeed central to, Mitchell's motion. In the course of hearing Venegas's action, the court decided that Mitchell's entitlement to attorney's fees is not limited under federal law to the Section 1988 award, and that a 40% contingent fee is reasonable in this case. In his motion, Mitchell in effect asked the court to answer two questions: (1) what amount of fees (if any) were due him; and (2) whether he had a right to a lien for that amount. The district court's ruling that the statutory award does not place a ceiling on Mitchell's claim to a contingent fee and that the 40% contingent fee is "reasonable" went a long way toward answering the first question posed by Mitchell's motion.

[2]The district court also indicated that it refused Mitchell's motion to intervene because "California courts have uniformly held that a discharged attorney may *not* intervene in his client's lawsuit to establish or enforce his lien." Since "[i]t is wholly clear that the right to intervene in a civil action pending in a United States District Court is governed by Rule 24 and not by state law," 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1905, p. 240 (2d ed. 1986), the court should not have relied on California law. The court also suggested that it was declining to decide Mitchell's motion because the "judgment is on appeal [and Mitchell's motion] is [thus] premature." Since the judgment has been affirmed, this reason is no longer valid.





[3] The existence of a common question of law or fact does not automatically entitle an applicant to intervene. Rather, Rule 24(b) necessarily vests "discretion in the district court to determine the fairest and most efficient method of handling a case. . . ." *SEC v. Everest Management Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972). In this case, however, all of the considerations which guide the exercise of judicial discretion clearly weighed in favor of permissive intervention.

In exercising its discretion to grant or deny permissive intervention, a court must consider whether the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b). Neither of the original parties in this case alleged that Mitchell's intervention would cause delay or prejudice to the adjudication of their rights. *Compare California Ex Rel. State Lands Commission v. United States*, 805 F.2d 857, 865-66 (9th Cir. 1986) (permissive intervention proper where plaintiff has not alleged that prejudice will result from the intervention). Indeed, neither of the original parties offered any opposition at all to Mitchell's intervention motion. *See Crumble v. Blumthal*, 549 F.2d 462, 468-69 (7th Cir. 1977) (district court abused its discretion in denying permissive intervention where the requirements for permissive intervention had been met and there was "no evidence" that intervention would prejudice the original parties).

In addition to the interests of the original parties, a court in deciding whether to permit intervention should evaluate whether the movant's "interests are adequately represented by existing parties." *State of California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986). In the case of a former attorney seeking intervention in order to secure rights under a contingent fee agreement, "[n]either of the existing parties is concerned with protecting the [attorney's] interest." *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970)(holding that under such circumstances, former attorney may intervene as of right). Venegas, in fact,

strenuously opposes Mitchell's claim to attorney's fees. In Venegas's view, Mitchell is entitled to at most about a sixth of the fees he demands. Since the district court chose to rule on issues central to Mitchell's claim, it should have allowed Mitchell to intervene so that he could defend his position.

Finally, judicial economy is a relevant consideration in deciding a motion for permissive intervention. *See, e.g., Austell v. Smith*, 634 F. Supp. 326, 335 (W.D.N.C. 1986); *Gordon v. Forsyth County Hosp. Authority, Inc.*, 409 F. Supp. 708, 718-19 (M.D.N.C. 1976), *aff'd in part, vacated in part*, 544 F.2d 748 (4th Cir. 1976). In order to decide Mitchell's motion to confirm a lien, the district court would need to decide whether the contingent fee agreement is valid under California state law[3] and, if so, whether Mitchell and Venegas intended that Mitchell enjoy an equitable lien upon the judgment. *See Centenko v. United California Bank*, 30 Cal.3d 528, 531, 179 Cal. Rptr. 902, 904 (1982)(under California law, a lien for attorney's fees depends upon the intention of the attorney and client in entering their fee agreement). The district court in this case is in the best position to decide these issues. No novel or difficult issues of state law appear to be at issue here, and the district court is well acquainted with the underlying litigation and the parties to this fee dispute. Further, the court has already twice involved itself in the details of Mitchell's and Venegas's fee arrangement: first, when it considered the contingent agreement in awarding attorney's fees under Section 1988, *see Quesada*, 850 F.2d at 540 (1983) (existence of a contingent agreement is a factor to consider in making a fee award), and second, when it found that a 40% contingent fee is "reasonable" in this case. We find the reasoning of the court in *Wood v. Motorola, Inc.*, 587 F. Supp. 531, 532-33 (D. Haw. 1984), persuasive in this case:

[3]Venegas challenges the contingent fee agreement on a number of state law grounds, including fraudulent representation.





> If this court refused to ... exercise jurisdiction [over a discharged attorney's motion for fees, the discharged attorney] would be forced to file a suit in state court. The parties to this action would then face a considerable delay and expense in having [the discharged attorney's] claim determined. They would be required to make a record that would consist of facts and arguments that are already before this court. Finally, the parties would be forced to litigate before a judge who lacks the long experience with this case, and with these parties, that this court has had. Equity, along with judicial economy, dictate that this court employ its ancillary jurisdiction to hear this motion.

We hasten to add that we are not holding that an attorney seeking to defend a contingency fee contract may intervene as of right in the underlying action. *Compare Stockton v. United States*, 493 F.2d 1021, 1023-24 (9th Cir. 1974) (rejecting attorney's right to intervene to assert a claim for attorney's fees in tax refund suit)[4] *with Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 53-54 (recognizing dismissed law firm's right to intervene in underlying maritime action in order to protect its contingency fee). The trial court abused its discretion when it denied Mitchell permissive intervention because it chose to address the merits of his contingency fee agreement.

III.

Venegas contends that the district court erred in holding that 42 U.S.C. § 1988 permits a court to recognize an attorney's entitlement under a contingent fee agreement that exceeds the statutory award. We review a district court's interpretation of a statute de novo. *Trustees of Amalgamated*

[4]In *Stockton*, the court noted that it was not deciding "whether as a general proposition an attorney's interest in a fee is a sufficient interest to call for intervention of right under Rule 24(a)(2)." 493 F.2d at 1024.

*Insurance Fund v. Geltmen Industries*, 784 F.2d 926, 929 (9th Cir. 1986).

[4] As we recognized in *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985), a statutory award under Section 1988 does not set a ceiling on an attorney's entitlement under a contingent fee contract.[5] However, a district court must review a contingent fee in a civil rights case to ensure that the contingent fee is reasonable.[6] *See id.* ("a contingent fee agreement should be enforced if reasonable"); *see also Wilmington v. J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986)(recognizing an attorney's claim to $146,667 under a contingent fee agreement where the statutory award was $35,721.25, court expressed approval of the Ninth Circuit's position that "normally the plaintiff should be responsible for . . . the contingent fee amount"); *Pharr v. Housing Authority of City of Prichard*, 704 F.2d 1216, 1218 (11th Cir. 1983)(recognizing an attorney's claim to $9,667 under a contingent fee agreement where the statutory award was $6,570, court reasoned

[5]In *Blanchard v. Bergeron*, 831 F.2d 563, 564 (5th Cir. 1987), the Fifth Circuit held that a Section 1988 award may not exceed the fee provided for in the plaintiff's contingency fee agreement with his attorney. In *Quesada v. Thomason*, 850 F.2d 537, 543 (9th Cir. 1988), we held that a contingency fee agreement cannot justify lowering an otherwise reasonable § 1988 fee. The Supreme Court in *Blanchard* held that, while a contingency fee agreement is a relevant 'factor' in determining a reasonable award under Section 1988, '[t]he trial judge should not be limited by the contractual fee agreement between plaintiff and counsel.' *Blanchard v. Bergeron*, 57 U.S.L.W 4191, 4193 (2/21/89).

[6]It is settled that, since "courts retain supervisory power over the attorney-client relationship [and since] fees are central to that relationship, . . . contingent fee arrangements are . . . subject to the courts' supervision." *Cooper v. Singer*, 719 F.2d 1496, 1505 (10th Cir. 1983). *See Starr v. Bowen*, 831 F.2d 872, 874 (9th Cir. 1987); *Hamner*, 769 F.2d at 1409. *See also Hoffert v. General Motors Corp.*, 656 F.2d 161, 165 (5th Cir. 1981); *Allen v. United States*, 606 F.2d 432, 435-36 (4th Cir. 1979); *Dunn v. H.K. Porter Co. Inc.*, 602 F.2d 1105, 1108 (3rd Cir. 1979); ABA Canons of Professional Ethics, Canon 13 (1908)("A contract for a contingent fee . . . should always be subject to the supervision of a court, as to its reasonableness").





that a review of the district court's findings "indicates nothing unreasonable about the plaintiff's contract or the . . . fee resulting therefrom"). *Compare Sullivan v. Crown Paper Board Co.*, 719 F.2d 667, 670 (3d Cir. 1983)(holding that attorneys are entitled to their full contingent fee, if reasonable, even when that fee exceeds the statutory award).

Since the legislative history of Section 1988 does not specifically address the effect of a statutory award on contingent fees, *see Cooper v. Singer*, 719 F.2d 1496, 1504 (10th Cir. 1983) (en banc) (noting sparse congressional guidance), we must look to Congress' purposes in enacting the fee-shifting provision. Venegas suggests that Congress' purpose in enacting Section 1988 was to guarantee attorneys full compensation for civil rights work. However, the Supreme Court in *Evans v. Jeff D.*, 475 U.S. 717 (1986), rejected a narrow view of Section 1988's purpose. Rather, the Court concluded that Congress enacted Section 1988 in order to "promot[e] respect for civil rights . . . . [by adding fee awards] to the arsenal of remedies available [to a plaintiff] to combat violations of civil rights." *Id.* at 731-32.

[5] We conclude that a rule limiting an attorney's fees under a contingent agreement to the statutory award would be inconsistent with Congress's goal of promoting respect for civil rights by enhancing "the arsenal" available to plaintiffs in civil rights cases. Congress has recognized that civil rights legislation can be effective only if the victims of civil rights abuses are able to attract attorneys to litigate their claims. *See City of Riverside v. Rivera*, 477 U.S. 561, 576-78 (1986) (discussing legislative history of Section 1988). A rule that limits attorneys' entitlements under contingent fee agreements to statutory awards would discourage attorneys from agreeing to represent civil rights plaintiffs. As we noted in *Hamner*,

> To hold that the statutory award is the maximum amount of fees available to counsel, notwithstanding

> a contingent fee arrangement providing for a higher fee, overlooks the basic nature and purpose of contingent fee agreements. *Contingent fee agreements enable plaintiffs with meritorious claims but limited finances to obtain counsel, and they are set to account for the risk of nonrecovery.* If attorneys begin to view statutory fees in civil rights cases as inadequate, use of the statutory award as a ceiling on fees could lead to a reluctance to represent civil rights plaintiffs, thus frustrating the intent of Congress.

*Hamner*, 769 F.2d at 1409 (emphasis added).

The need for private arrangements which "account for the risk of nonrecovery" is greater now than it was when we decided *Hamner*. When *Hamner* was decided, the rule in this Circuit was that courts could factor in "the risk of nonrecovery" in awarding attorney's fees under Section 1988. *See White v. City of Richmond*, 713 F.2d 458, 462 (9th Cir. 1983). In *Pennsylvania v. Delaware Valley Citizens' Council*, 107 S.Ct. 3078 (1987), a plurality held that courts may not consider the risk of nonrecovery in awarding attorney's fees under Section 1988 except possibly in exceptional cases. Justice O'Connor did not join the plurality opinion, but agreed that statutory awards should not be based on "the 'riskiness' of any particular case." *Id.* at 3089. *See Fadhl v. City and County of San Francisco*, 859 F.2d 649, 650 (9th Cir. 1988) (per curiam) ( discussing the "majority" holding in *Delaware Valley*).

[6] The plurality in *Delaware Valley* assumed that mechanisms existed outside of statutory awards which encourage attorneys to accept risky civil rights cases. Specifically, the Court contended that its decision to eliminate "risk-enhancement" from Section 1988 awards would not compromise Congress's goal of encouraging competent counsel to represent civil rights plaintiffs because even impecunious plaintiffs may have "*damages* case[s] that competent lawyers would take in the absence of fee-shifting statutes." *Id.* at 3086-87 (emphasis added). If we accepted Venegas's argument that contingent fees may never exceed statutory awards, we would in effect be eliminating this category of civil rights cases.





[7] The Supreme Court's holding on waivers of attorney's fees awards under § 1988 also supports our view that § 1988 does not place a ceiling on an attorney's entitlement under a contingency fee agreement. The Court in *Evans v. Jeff D.*, 475 U.S. 717 (1986), rejected a general proscription against waiving attorney's fees under § 1988 as a condition of settlement of § 1983 suits. If courts must respect the freedom of clients and attorneys to agree that the attorney will receive no § 1988 fee in order to achieve a satisfactory § 1983 settlement, fairness requires that we respect the freedom of clients and attorneys to agree to a contingency fee in excess of a § 1988 award. We should provide wide parameters to the negotiations between attorneys and their clients. *See Evans*, 475 U.S. at 732-34. As with fee waivers, automatic approval is not required. Instead, the district court may only enforce reasonable fee agreements.

Venegas argues that contingent fees in excess of the statutory awards are "windfalls" for civil rights attorneys. It is clear Congress intended that attorneys fees in civil rights cases would be "adequate to attract competent counsel, but [would not be] windfalls to attorneys." S. Rep. No. 94-1011, 94th Cong., 2nd Sess. at 6, U.S. Code & Admin. News 1976, p. 5913. The Second Circuit has limited attorneys' entitlements under contingent agreements to the statutory awards in order to prevent "windfall recoveries for successful attorneys." *Wheatley v. Ford*, 679 F.2d 1037, 1041 (2d Cir. 1982). *See also Sargeant v. Sharp*, 579 F.2d 645, 648 (1st Cir. 1978)(suggesting that "courts are . . . rightly concerned that windfall fees be avoided and that an otherwise reasonable fee not be made excessive by virtue of a fee agreement"). The fear of windfall recoveries, however, is unfounded for two rea-

sons. First, there is no reason to believe that civil rights plaintiffs will routinely compromise their own interests by agreeing to one-sided contingent fee agreements. *See, e.g., Pharr,* 704 F.2d at 1218 (courts should give deference to a contingent fee contract because it "represents [the attorney's and client's] notion of what constitutes a reasonable fee"); *Hagge v. Bauer,* 827 F.2d 101, 111 (7th Cir. 1987)("Our latest decisions have advanced the notion that the contingent fee arrangement should carry considerable evidentiary significance in ascertaining a reasonable fee award"). Second, by reviewing contingent fee agreements for reasonableness, district courts in effect protect civil rights plaintiffs from "windfall recoveries" by their attorneys.[7]

## IV.

In this case, we find that the district court did not err in ruling that the contingency fee agreement is reasonable. We review a district court's award of reasonable attorney fees under Section 1988 for an abuse of discretion. *See, e.g., Miller v. Los Angeles Co. Bd. of Education,* 827 F.2d 617, 619 (9th Cir. 1987)(involving 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k)). The same standard applies where a district court reviews the reasonableness of a contingent fee that exceeds the statutory award. *See Krause v. Rhodes,* 640 F.2d 214, 218-19 & n.5 (6th Cir. 1981)(applying an abuse of discretion standard to a district court's review of a contingent fee agreement, the court reasoned that "[w]hile the language of § 1988 [granting district court judges discretion to award a reasonable attorney's fee] does not expressly empower a district court to limit fees derived under a private agreement between the prevailing attorney and his client, it is indicative of the extensive

[7]Where the district court concludes that a contingent fee that exceeds the statutory award is reasonable, the plaintiff may be required to pay the difference between the 1988 award paid by the defendant and the contingent fee. *Hamner,* 769 F.2d at 1409. The plaintiff's attorneys are not entitled to *both* the statutory award and the full amount of the contingent fee.



powers available to district judges in supervising attorney's fees in civil rights cases").

**[8]** The district court found that Mitchell's contingent fee is reasonable because it reflected the risk of nonrecovery he assumed in accepting this case.[8] We find no basis in the record to support a ruling that the district court abused its discretion in making this finding. Venegas has presented no evidence suggesting that a 40% contingent fee is not standard in California for civil rights cases, or that his particular case posed an unusually low risk for a civil rights case. Moreover, we previously recognized that this case turned on the resolution of a "difficult question of credibility." *Venegas v. Wagner,* 831 F.2d 1514, 1519 (9th Cir. 1987). *Compare Hagge v. Bauer,* 827 F.2d at 112 (upholding statutory award equivalent to a 40% contingency fee in a civil rights case even though the case involved "settled precedent, and no defense of immunity").

## CONCLUSION

We conclude that the district court abused its discretion in denying Mitchell's motion to intervene. We remand to the district court to determine the merits of Mitchell's motion to confirm a lien. We affirm the district court's ruling that Mitchell's entitlement to attorney's fees is not limited to the § 1988 award and that a 40% contingent fee is reasonable in this case.

AFFIRMED in part, REVERSED in part, and REMANDED.

[8]In *Hamner,* we recognized that a court has the discretion to consider a number of other factors in determining the reasonableness of a contingent fee, including the gap between the statutory award and the contingent fee and the quality of the attorneys performance. *Hamner,* 769 F.2d at 1409-10. *See also Sears,* 779 F.2d at 1456 (considering attorney's length of participation, level of performance, success, and level of finances as well as "risk of nonrecovery" in deciding reasonableness of a contingent fee in a civil rights case).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUAN FRANCISCO VENEGAS,

Plaintiff,

v. No. CV 77-4047-RJK

RONNIE J. SKAGGS,
CARTHEL S. ROBERSON,

Defendants.

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MEMORANDUM OF DECISION AND ORDER

FACTS

On February 28, 1986, this Court entered Judgment on a jury verdict for plaintiff for $2.12 million in damages against three defendants for violations of 42 U.S.C. section 1983. After post-trial motions were heard, two defendants remained subject to judgment for $2.08 million. Both plaintiff and defendants appealed.

On August 14, 1986, this Court entered judgment awarding plaintiff $117,000 in attorneys' fees under 42 U.S.C. section 1988. Of this, $75,000 was awarded for the work of plaintiff's trial counsel, Michael R. Mitchell. Defendants appealed the judgment for statutory attorneys' fees.

On September 3, 1986, this Court stayed enforcement of the judgment for attorneys' fees pending appeal. Plaintiff appealed the order granting the stay.

On September 14, 1986, attorney Mitchell signed a stipulation withdrawing as plaintiff's counsel of record. Mitchell then filed this motion for leave to intervene for the limited purpose



of confirming a lien on the judgment for attorneys' fees due under a contingent retainer agreement. Plaintiff apparently does not oppose intervention, but claims Mitchell is entitled to nothing under the contingent retainer agreement.

ANALYSIS

I. *Subject Matter Jurisdiction*

Although neither side squarely addresses the issue, this Court must first consider whether it has subject matter jurisdiction to entertain this motion.

A. *Effect of Pending Appeals of Judgment-in-chief and Award of Statutory Attorneys' Fees.*

Ordinarily, the effective filing of a notice of appeal divests the district court of jurisdiction with respect to all matters involved in the appeal. *Grigg v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982). This rule is not absolute, however; the Ninth Circuit has held that a district court retains jurisdiction to award attorneys' fees even though an appeal on the merits is pending. *Masalosalo v. Stonewall Insurance Co.*, 718 F.2d 955, 957 (9th Cir. 1985). *See generally Culinary & Service Employees Union v. Hawaii Employee Benefit Admin., Inc.*, 688 F.2d 1228, 1229, 1232 (9th Cir. 1982).

In reaching its decision in *Masalosalo*, the court noted that "[t]he rule of exclusive appellate jurisdiction is a creature of judicial prudence . . . and is not absolute." *Id.* at 956. The purpose of the rule is to avoid the inefficiency of having two courts consider the same issue simultaneously. *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 200 (9th Cir. 1977). Because an appeal of the judgment-in-chief does not bring the issue of attorneys' fees before the appellate court, no procedural difficulties arise from the district court's determination of attorneys' fees. As the *Masalosalo* court noted, the district court's prompt determination of attorneys' fees can prevent the piecemeal appeals that would result if attorneys' fees could not be awarded until the appeal was decided. *Masalosalo*, 718 F.2d at 956.

In the instant case, a notice of appeal has been filed with respect to both the judgment-in-chief and the award of section 1988 attorneys' fees. The parties now seek a determination by the district court of attorneys' fees under a private contingent retainer agreement. As in *Masalosalo*, there is no danger of simultaneous consideration of the issue by two courts because Mitchell's claim to a lien is not before the appellate court. Moreover, a prompt determination by this Court may permit any appeal taken to be consolidated with the other appeals now pending, thus serving the policy against piecemeal appeals. For these reasons, the Court concludes that the pending appeals of the judgment-in-chief and the award of statutory attorneys' fees do not divest this court of jurisdsiction over the contingent fee agreement between Mitchell and plaintiff.

B. *Mitchell's Standing to Raise his Claim*

Another problem of jurisdictional dimensions arises because Mitchell is not a party to this action and no longer represents plaintiff. Mitchell attempts to overcome this hurdle by moving to intervene pursuant to Fed.R.Civ.P. 24(a) or 24(b). *See* 3B Moore's Federal Practice, § 24.07[2] ("Whether a would-be intervenor has the required interest in the litigation is thus, in part, a question of standing."). Plaintiff does not oppose Mitchell's application to intervene.

1. Intervention as of right

Mitchell first claims that he is entitled to intervene as of right under Fed.R.Civ.P. 24(a)(2). To meet the requirements of Rule 24(a)(2), Mitchell must establish that: (1) his motion to intervene is timely, (2) he has an interest relating to the subject matter of the action, (3) his interest will be impaired by a disposition of the action without his intevention, and (4) existing parties do not adequately represent his interest. *Stockton v. United States*, 493 F.2d 1021, 1022-23 (9th Cir. 1974).

Although Mitchell claims that his interest in his fee is an interest relating to the subject matter of the action and that it



will be impaired by disposition of the actioin without intervention, he cites no authority to support his position. However, at least one court has held that an attorney's interest in securing fees under a contingent retainer agreement satisfies the requirements for invervention as of right under Fed.R.Civ.P. 24(a)(2). *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir.1970), *accord Gilbert v. Johnson*, 601 F.2d 761, 767 (5th Cir. 1979).

In *Gaines*, a law firm sought leave to intervene in its client's personal injury diversity action after the client discharged the firm without cause. Intervention was sought for the purpose of protecting the firm's claimed interest in attorneys' fees under a contingent fee contract. *Gaines*, 434 F.2d at 53-54.

The court held that the district court erred in denying leave to intervene. The Fifth Circuit reasoned that:

> it is clear that the appellant law firm here claimed an interest in the subject of the action against [defendants] and is so situated that the final dispositioin of the action may as a practical matter impair or impede its ability to protect that interest. Neither of the existing parties is concerned with protecting appellant's interest.

*Id.* at 54 (citations omitted).

The Ningh Circuit analyzed the situation differently, however, in *Stockton v. United States*, 493 F.2d 1021 (9th Cir. 1974). In *Stockton*, an attorney sought leave to intervene as of right in his clients' tax refund suit to assert his claim for attorneys' fees. *Id.* at 1022. Prior to the attorney's motion for leave to intervene, however, the parties entered into an agreement providing that a percentage of the judgment equal to the attorney's claimed fee was to be held by plaintiffs' new attorney pending resolution of the fee dispute. The Ninth Circuit held that because the terms of the agreement adequately protected the attorney's interest, a final judgment in the principal case would not affect it. *Id.* at 1023. Thus, the attorney was not entitled to intervene as of right. *Id.*

It should be noted that the Ninth Circuit expressly left undecided the issue of whether an attorney's interest in a fee would ever be sufficient to invoke intervention as of right. *Id.* at 1024. At least one court has held that it is not. *Budro v. Brown & Root, Inc.*, 109 F.R.D. 619, 620 (E.D. Tex. 1986).

In *Gilbert v. Johnson*, 601 F.2d 761 (5th Cir. 1979), the Fifth Circuit summarily followed its earlier decision in *Gainess*. However, Judge Rubin wrote separately to argue that lawyers employed on a contingent basis should not be allowed to intervene in their clients' lawsuits to protect their fees, "at least when they can protect their interest in some other way." *Id.* at 761, 767 (Rubin, J., concurring). Judge Rubin suggested that courts should look to the state law governing the attorney-client relationship to determine what protections are available. *Id.*

Mitchell makes no attempt to establish that each of the four requirements for intervention as of right under Fed.R.Civ.P. 24(a)(2) exist in the instant case. Rather, he appears to argue that because disposition of the action may impede or impair his ability to collect his attorneys' fee, his interest in securing these fees necessarily constitutes an interest relating to the subject matter of the action. He apparently considers it obvious that his motion was timely and that existing parties do not adequately represent his interest, as he makes no mention of these factors.

Mitchell argues that disposition of this action may affect his ability to collect fees because (1) "the parties may settle the action in a manner which could divert funds owed applicant for attorneys' fees," and (2) "other events, such as intervening bankruptcy or filing of different liens, could jeopardize applicant's ability to protect his interest in attorneys' fees." It is manifest, however, that neither of these possibilities can in any way affect Mitchell's rights under the contingent fee contract. Plaintiff and Defendants can do nothing as between them that would affect Mitchell's entitlement to those fees. Moreover, the possibility that other creditors of plaintiff may have an interest in moneys recovered by plaintifif has nothing to do with the disposition of this lawsuit.



This Court finds that Mitchell's rights under a contingent fee agreement have no relationship to the subject matter of this lawsuit. The interest that Mitchell seeks to assert in intervention arises under a contract between two California residents, the terms of which are governed by state law. *See Budro v. Brown & Root, Inc.*, 109 F.R.D. 619, 620 (E.D. Texas 1986). The subject matter of this lawsuit concerns whether defendants violated plaintiff's federal civil rights.

The Court recognizes that Mitchell is concerned not so much with protecting his entitlement to fees under the contract, but rather with assuring that he is in a position to collect the fees before the fund is dissipated. However, even assuming *arguendo* that such an interest constitutes an interest relating to the subject matter of the action, Mitchell is not entitled to intervene under Rule 24(a)(2) if that interest is otherwise adequately protected. *Stockton v. United States*, 493 F.2d 1021 (9th Cir. 1974). As discussed below, California law governing attorneys' equitable liens adequately protects Mitchell's ability to recover his contingent fee.

The Court concludes Mitchell has failed to estabalish that he is entitled to intervene under Rule 24(a)(2).

2. Permissive intervention

Mitchell alternatively asks this Court to allow him to intervene under Fed.R.Civ.P. 24(b)(2), which gives the Court discretion to permit intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." In support of this request, Mitchell merely states that "applicant's claim for a lien for attorney's fees is inextricably bound to the questions of law and fact decided in this action, particularly insofar as they relate to whether plaintiff performed as called for under the retainer agreement." However, this Court is unable to discern any relationship between plaintiff's civil rights claims and Mitchell's claim that, under California law, he is entitled to a lien for attorneys' fees under a contingent fee contract. Accordingly, the Court finds Mitchell is not entitled to intervene under Fed.R.Civ.P. 24(b)(2).

C. *Equitable Power of Federal Court to Supervise Collection of Attorneys' Fees under Contingent Fee Contracts*

Although this Court is not persuaded that Mitchell should be allowed to intervene to assert a claim for attorneys' fees under a contingent retainer agreement, Mitchell alternatively argues that this Court has discretion to determine attorneys' fees under private contracts as "ancillary to its conduct of the principal litigation."

In support of this contention, Mitchell relies on *Moore v. Telfon Communications Corp.*, 589 F.2d 959 (9th Cir. 1978). In *Moore*, the Ninth Circuit recognized and adopted the rule that a federal court has the power to determine fee disputes as ancillary to its conduct of the principal litigation. *Id.* at 967. The court also held, however, that "[w]hether to do so is a matter within the trial court's discretion." *Id.*

Several circuits have recognized the principal that "[a] federal district judge has broad equity power to supervise the collection of attorneys' fees under contingent fee contracts." *Krause v. Rhodes*, 640 F.2d 214, 218 (6th Cir. 1981). *See also Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985); *Cappel v. Adams*, 434 F.2d 1278, 1279 (5th Cir. 1970); *Garrett v. McRee*, 201 F.2d 250, 253 (10th Cir. 1953). The court's determination is reviewable only under an abuse of discretion standard. *Cappel v. Adams*, 434 F.2d 1278, 1280 (5th Cir. 1970).

Accordingly, this Court has jurisdiction to consider whether to determine Mitchell's rights under the contingent fee agreement.

II. *Mitchell's Rights under the Contingent Fee Agreement*

Mitchell argues that under California law, he is entitled to an equitable lien against any recovery in this case. However, plaintiff contends that because this Court has already awarded $75,000 in "reasonable" attorneys' fees under 42 U.S.C. section 1988 for Mitchell's work, Mitchell is entitled to nothing under the contingent retainer agreement.



A. *California Law of Equitable Attorneys' Liens*

On September 18, 1985, plaintiff and Mitchell entered into a contingent retainer agreement under which Mitchell was to represent plaintiff in this action for "one trial only." In return, Mitchell was to receive forty percent of "the gross amount recovered," less a $10,000 retainer. Plaintiff later consented to the association of another attorney in the action; the attorneys were to share fees on a fifty-fifty basis. Plaintiff prevailed at trial and, after entry of judgment on the verdict, retained new counsel to prosecute the appeals. Mitchell thus seeks a lien for twenty percent of plaintiff's recovery less the $10,000 retainer.

California law does not recognize a common law attorney's lien upon a judgment. *Isrin v. Superior Court*, 63 Cal. 2d 153, 45 Cal. Reptr. 320, 403 P.2d 728 (1965); *Hansen v. Jacobsen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. 580, 583 (1986). However, the parties may create an equitable lien by contract. *Isrin*, 63 Cal. 2d at 158-59, 45 Cal. Rptr. 320, 323; *Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 583. Although it is not necessary that the work "lien" appear in the contract, the parties must have manifested an intent that the lawyer have a security interest in the judgment. *Cetenko v. United California Bank*, 30 Cal. 3d 528, 531, 179 Cal. Rptr. 902, 904 (1982); *Isrin*, 63 Cal. 2d 153, 45 Cal. Rptr. at 320; *Bartlett v. Pacific Nat'l Bank*, 110 Cal. App. 2d 683, 689, 244 P.2d 91, 94-95 (1952).

California courts have uniformly held that a discharged attorney may *not* intervene in his client's lawsuit to establish or enforce his lien. *Hansen v. Mt. Diablo Unified School Dist.*, 56 Cal. App. 3d 230, 235, 126 Cal. R-tr. 890, 893 (1976); *Hendricks v. Superior Court*, 197 Cal. App. 2d 586, 588-589, 17 Cal. Rptr. 364, 365 (1961). Rather, the attorney must file an independent action. *Id.* The attorney may, however, file a notice of a lien in the client's action, although he is not required to do so to protect his claim. *Cetenko*, 30 Cal. 3d at 533 n.5, 179 Cal. Rptr. at 905 n.5; *Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 585.

Once a lien for attorneys' fees is created, its priority is established as of the date the contract was entered into. *Cetenko*,

30 Cal. 3d at 532-536, 179 Cal. Rptr. at 904-907; *Haupt v. Charlie's Kosher Market*, 17 Cal. 2d 843, 846, 112 P.2d 627 (1941); *Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 584.

Finally, even though the attorney may have a contractual lien, whether express or implied, he may not seek a determination of the amount due him until the contingency provided for in the agreement has occurred. *Bandy v. Mt. Diablo School Dist.*, 56 Cal. App. 3d 230, 234, 126 Cal. Rptr. 890, 892 (1976).

The contingent retainer agreement at issue in the instant case provides that Mitchell is entitled to a percentage of "the gross amount recovered" in exchange for his representation through "one trial only." The agreement does not create an express lien or security interest. Mitchell argues, however, that the court should find the parties intended to create a security interest. Mitchell claims that this can be implied from "plaintiff's inability to pay attorney fees except from a fund generated by the litigation." However, "[t]his fact alone would not establish a lien or even that the parties contemplated one." *Bartlett v. Pacific Nat'l Bank*, 110 Cal. App. 2d 283, 244 P.2d 91, 95 (1952).

In any event, this Court need not decide whether the contingent retainer agreement at issue gave rise to an implied equitable lien against any recovery. Because the judgment is on appeal and has been stayed pending appeal, Mitchell's request that the Court determine the amount to which he is entitled under the contract is premature. *Bartlett*, 110 Cal. App. 2d 283, 244 P.2d 91, 95.

However, Mitchell has protected his claimed interest in the judgment by filing this motion, thereby giving notice to all parties of his claim. *Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 585 (formal filing of notice of lien not required; informal written notice to present attorney while action pending sufficient.) Once plaintiff recovers judgment, Mitchell can bring an action in state court, if necessary, to establish the existence of a lien and to determine the amount to which he is entitled thereunder. *See Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 585 n.6 (filing of notice of lien does not of itself affect question of existence



or amount of lien). Accordingly, Mitchell's motion to confirm a lien is DENIED without prejudice to a later assertion of the claim in state court.

B. *Effect of Statutory Award of Attorneys' Fees on Mitchell's Rights under the Contingent Retainer Agreement.*

Plaintiff argues that this Court should exercise its descretion to reduce or eliminate completely the amount to which Mitchell may be entitled under the contingent retainer agreement. Plaintiff relies on the Ninth Circuit's holding in *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985). In *Hamner*, the court held that where plaintiff is entitled to an award of attorney's fees under 42 U.S.C. section 1988 and is also liable for a higher amount under a contingent fee contract, the district court has discretion to consider whether plaintiff should be compelled to pay the difference between the statutory award and the sum provided for by contract. *Id.*

Mitchell counters that the true thrust of the *Hamner* decision is that "a contingent fee agreement should be enforced if reasonable." *Id.* at 1409. Mitchell correctly contends that the *Hamner* court expressly refused to adopt the rule followed in the Second and Tenth Circuits treating statutory awards as a ceiling on attorneys' compensation in civil rights cases. *Id.* Rather, the Ninth Circuit reasoned that depriving attorneys of the benefit of private fee arrangements would frustrate congressional intent to promote private enforcement of civil rights. *Id.* The court recognized that "[c]ontingent fee arrangements enable plaintiffs with meritorious claims but limited finances to obtain counsel, and they are set to account for the risk of nonrecovery." *Id.*

In reaching its decision, the Ninth Circuit noted that there may be instances when requiring plaintiff to pay the difference between a lower statutory award and a contingent fee may itself frustrate congressional intent to promote private enforcement of civil rights. *Id*, at 1409-10. In such situations the district court may exercise its equitable power "to supervise fee awards under

contingent fee arrangements to avoid unreasonable results." *Id.* at 1409. In exercising this discretion, the court may consider such factors as the level of counsel's performance and whether an award beyond the statutory amount would constitute a windfall.

Plaintiff argues that the difference between a statutory award of $75,000 and Mitchell's approximately $200,000 contingent fee constitutes a windfall, and that requiring plaintiff to pay this difference will frustrate congressional intent to provide access to counsel in civil rights cases. Plaintiff contends that because this Court determined $75,000 was a "reasonable fee" for Mitchell's work, Mitchell's compensation must be limited to that amount. According to plaintiff, there cannot be two "reasonable" fees.

The $75,000 figure was arrived at by multiplying a reasonable hourly rate by the number of hours Mitchell expended. This "lodestar" figure was then increased by a factor of two to reflect Mitchell's competent performance. However, a "reasonable" contingent fee does more than compensate an attorney for the time reasonably expended on a case. As the Ninth Circuit expressly recognized, contingent fee arrangements allow fee-indigent clients to obtain counsel to prosecute their civil rights claims while compensating the attorney for the risk of possible nonrecovery. This Court finds that Mitchell's contingent fee does not constitute a windfall.

Plaintiff next argues that the Court should void the contingent fee agreement under a California statute providing that "a law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513. Plaintiff argues that a provision in the contract giving Mitchell "the right to apply for and collect any attorney fee award made by the court" violates the rule that section 1988 attorney fees must be awarded to plaintiff, not to counsel. *See Evans v. Jeff D.*, 106 S.Ct. 1531, 1538-40 (1986); *Willard v. City of Los Angeles*, 803 F.2d 526 (9th Cir. 1986).

Plaintiff's contention is without merit. This Court expressly awarded section 1988 fees to plaintiff in its Memorandum of



Decision and Order of August 15, 1986. Moreover, the contingent fee contract expressly provides that any award of attorneys' fees must be offset against Mitchell's contingent fee. Plaintiff's rights under section 1988 have not been affected in any way by the contingent fee contract.

Plaintiff finally argues that this Court should reduce or eliminate Mitchell's contingent fee because Mitchell refused to prosecute the appeals unless plaintiff agreed to give him another ten percent of the recovery. Plaintiff claims he believed that the original contingency agreement obligated Mitchell to prosecute the action until all appeals were exhausted.

The contract, however, clearly provides that it

> covers one trial only. In the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of [Mitchell's] employment, but are not obligated to do so.

Plaintiff does not claim that he did not read the agreement before signing it. When the appeals were taken, Mitchell provided plaintiff with a written proposal, insisting that it be reviewed by independent counsel. Plaintiff took the proposal to independent counsel and then decided to retain other counsel for the appeals. The Court finds that both Mitchell and plaintiff acted within their rights.

The Court finds no reason to reduce or eliminate Mitchell's rights under the contingent fee agreement.

## CONCLUSION

The appeals of the judgment-in-chief and the statutory award do not deprive this Court of subject matter jurisdiction to consider the parties' rights under the contingent fee contract. However, Mitchell is not entitled to intervene in this action under either Fed.R.Civ.P. 24(a)(2) or 24(b)(2).

This Court has jurisdiction to determine the rights of the parties under the contingent retainer agreement as ancillary to its

conduct of the principal litigation. The Court declines to exercise its discretion to do so, however. Mitchell can adequately protect his rights under California law when plaintiff's recovery in this action has been finally determined and all appeals exhausted. Mitchell's filing of this motion is deemed to give notice to all parties in this action of Mitchell's claim for an equitable lien on the judgment.

The Court finds no persuasive reason to exercise its discretion under *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) to reduce or eliminate Mitchell's rights under the contingent fee agreement.

THEREFORE, IT IS HEREBY ORDERED THAT Mitchell's motion to intervene to confirm a lien is DENIED.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: January 22, 1987.

ROBERT J. KELLEHER
Senior District Judge



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| JUAN FRANCISCO VENEGAS, | ) | |
| | ) | No. CV 77-4047-RJK |
| *Plaintiff,* | ) | |
| | ) | |
| v. | ) | O R D E R |
| | ) | |
| RONNIE J. SKAGGS, CARTHEL S. ROBERSON, | ) | |
| | ) | |
| *Defendants.* | ) | |

IT IS HEREBY ORDERED that the Court's Memorandum of Decision and Order filed January 23, 1987 is corrected to read as follows:

page 14, line 11, "approximately $200,000" is changed to read "approximately $416,00."

The Court shall send, by United States mial, a copy of this Order to counsel for the parties.

DATED: February 9, 1987

ROBERT J. KELLEHER
Senior District Judge

## CIVIL RIGHTS ATTORNEYS FEE AWARDS ACT
## (42 U.S.C. § 1988)

**§ 1988. Proceedings in vindication of civil rights; attorney's fees**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(R.S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641; Oct. 21, 1980, P. L. 96-481, Title II, § 205(c), 94 Stat. 2330.)